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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-1699

THE TRAVELERS INSURANCE COMPANY,

Petitioner,

v.

MAIDA LUDVIK SHERIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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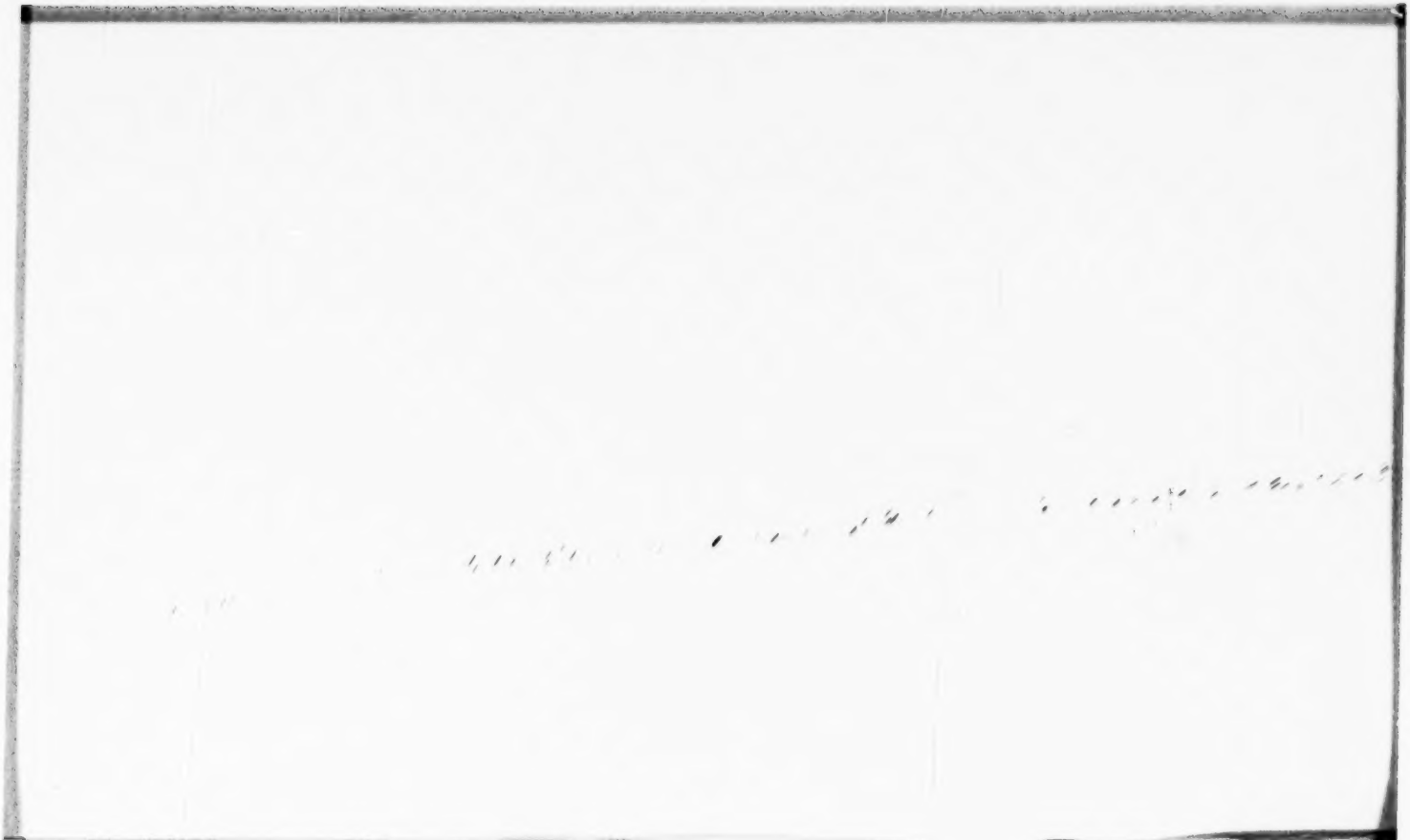

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THE TRAVELERS INSURANCE COMPANY,

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v.

MAIDA LUDVIK SHERIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Travelers Insurance Company (Travelers) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on February 12, 1974. The court below vacated the judgment of the United States District Court for the Eastern District of Virginia, which had upheld, in pertinent part, your petitioner's contention with respect to the awarding of attorney's fees.

OPINIONS BELOW

The opinion of the Court of Appeals, rendered February 12, 1974, as reported at 491 F.2d 603 (4th

Cir. 1974) in the official reports, and is also set forth in the appendix hereto beginning at 17A (citations with the suffix "A" are to the Appendix hereto). The Findings of Fact, Conclusions of Law and Judgment Order, which was reversed by the Court of Appeals, has not been reported in the official reports, but is set forth in the appendix hereto beginning at 13A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1974 (17A). This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. In this action brought in the United States District Court for the Eastern District of Virginia, but governed by Virginia state law, should the United States Court of Appeals have deferred and/or awaited decision of the decisive issue of law by the State Courts of Virginia, in accordance with established practice in other circuits, to permit the State Court to interpret the State of Virginia's own statutes, in a situation where Virginia's interests are vital and paramount?

2. Has the Court of Appeals properly performed its duty under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), in holding that Virginia law requires a workmen's compensation insurance carrier to reimburse the injured party or his substitute for attorney's fees based on an amount recovered by the claimant from a liable third party, though such amount was never paid by the insurance carrier?

STATUTES INVOLVED

Virginia law, *Virginia Code Annotated* §65.1-41 (1973) is as follows:

> "*Subrogation of employer to employee's rights against third parties; evidence; recovery; compromise.* – The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the employer for the benefit of the injured employee or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in §65.1-43. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Industrial Commission and the injured employee of the personal representative or dependents of the deceased employee being first had and obtained."

Virginia law, *Virginia Code Annotated* §65.1-42 (1973) is as follows:

"*Protection of employer when employee sues third party.* – In any such action by such employee, his personal representative or other person against any person other than the employer, the court shall, on petition or motion of the employer at any time prior to verdict, ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses, incurred by the employer under the provisions of this Act, and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's fees as provided in §65.1-43; and in event of judgment against such person other than the employer the court shall in its order require that the judgment debtor pay such compensation and expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor."

Virginia law, *Virginia Code Annotated* §65.1-43 (1973) is as follows:

"*Expenses and attorney's fees in action under §65.1-41 or 65.1-42.* – In any such action, or claim for damages, by such employee, his personal representative or other person against any person other than the employer, and in any such action brought, or claim asserted, by the employer under his right of subrogation provided for in §65.1-41, if a recovery is effected, either by judgment or voluntary settlement, the reasonable expenses and reasonable attorney's fees of such claimants shall be apportioned pro rata between the employer and the employee, his personal representative or other person, as their respective interests may appear."

STATEMENT OF THE CASE

On September 23, 1969, Maida Ludvik Sheris filed suit in the United States District Court for the Eastern District of Virginia against, among others, British European Airways Corporation and The Travelers Insurance Company (Civil Action No. 310-69-A). Jurisdiction in the District Court was based upon the Death on the High Seas Act, 46 U.S.C. §§761-768.

The above mentioned suit arose out of the crash of a British European Airways Corporation airplane in the Aegean Sea near the Island of Rhodes on October 12, 1967 (2A). Plaintiff's decedent William T. Sheris, an employee of the Sheris Company, and while in the course of his employment, was killed in the crash (13A). The Travelers Insurance Company was, at that time, the workmen's compensation insurance carrier for the Sheris Company (18A).

Subsequently, Mrs. Sheris, as a statutory dependent of the decedent, made a claim for death benefits for herself and the other statutory dependents under the Virginia Workmen's Compensation Act against the Sheris Company and The Travelers Insurance Company (18A). In this proceeding, Mrs. Sheris was awarded compensation pursuant to Virginia Code §65.1-65 in periodic payments, i.e. $45.00 per week for the joint and equal use of herself and the dependants (14A). It should be noted herein that an employer's total liability for such an award is not ascertained at the time of the award but is subject to subsequent modification according to the provisions of the Act. The maximum that Travelers would have been required to pay under the award was $45.00 per week for 400 weeks or $18,000.00 (18A).

The plaintiffs (Richard A. Mehler, a co-plaintiff, was, along with Mrs. Sheris, an executor of the estate)

employed counsel to represent them in their claim against British European Airways Corporation and agreed to pay such counsel a 1/3 contingent fee on the recovery (14A). The plaintiff in the District Court suit sought the court's approval of a settlement entered into by the plaintiff and defendant British European Airways and a judgment that defendant Travelers was not entitled to share in the proceeds of such settlement (5A).

Travelers made payments pursuant to the above mentioned compensation award until November 25, 1969 at which time it discontinued its payments and applied to the Industrial Commission of Virginia to vacate and terminate the Award on the grounds that Mrs. Sheris had or was about to recover from a third party a sum in excess of the Award (14A). Travelers based such a right on Virginia Code Annotated §65.1-41 (1973), which, basically, allows the employer or insurance carrier to recoup from a liable third party monies it has paid to a claimant. Mrs. Sheris contested Travelers' right to vacate and terminate the Award and its right to subrogation before the Industrial Commission of Virginia. The Commission decided in favor of Travelers and Mrs. Sheris appealed to the Supreme Court of Virginia. The Supreme Court of Virginia affirmed the Commission's ruling. *Sheris v. Sheris Company and Travelers Insurance Company*, 212 Va. 825, 188 S.E.2d 367 (1972). Mrs. Sheris then petitioned for Writ of Certiorari to the Supreme Court of the United States. The petition was denied. *Sheris v. Sheris Company and Travelers Insurance Company*, 409 U.S. 878 (1972).

Travelers, at the time it discontinued making payments on November 25, 1969, had paid $5,040.00 (14A).

On December 12, 1969, the District Court judge entered judgment in favor of the plaintiffs and against the defendant, British European Airways Corporation, in the sum of $75,000.00 (11A). This recovery was apportioned among Mrs. Sheris, the dependent children and the mother of the deceased employee (11A). Because of its subrogated interest thereto, Travelers was eventually awarded $5,040.00 minus 1/3 attorney fees payable to Mrs. Sheris and her attorneys (15A).

Mrs. Sheris also contended before the District Court that she was entitled to reimbursement for attorney's fees equal to 1/3 of not just the amount of compensation paid by Travelers ($5,040.00) but rather of $18,000.00, the amount Travelers may have had to have paid, had it not been for the District Court suit (19A). The District Court held that Mrs. Sheris' contention that she was entitled to recover $6,000.00 (1/3 x $18,000.00) from Travelers had "no merit" (15A). Dissatisfied with this ruling, Mrs. Sheris appealed to the United States Court of Appeals for the Fourth Circuit. Travelers also filed a cross appeal, however, it is not relevant to the filing of this petition. The Fourth Circuit in vacating the judgment of the District Court held "that Travelers' obligation to pay a part of the attorney's fee must be based on the full compensation award of $18,000.00." (26A).

In reaching its decision, the Fourth Circuit correctly noted that "the Supreme Court of Virginia has not been called upon to decide the correct basis for apportioning an attorney's fee when the employee's recovery against the wrongdoer is in excess of both the paid and unpaid portions of a compensation award." (21A). Considering the numerous workmen's compensation claims brought in the State of Virginia, along with the potential liability of a third party in many of

them, the Fourth Circuit decision is bound to have astounding and far reaching impact on this area of the Virginia workmen's compensation law. Despite this, the Fourth Circuit did not defer decision on this important state issue until the State Courts of Virginia had a chance to interpret the relevant portions of the Virginia state statutes. Further, rather than analytically considering the appropriate statutory language, the Fourth Circuit followed the reasoning and conclusions of other state courts, which were interpreting statutes that materially differed from the Virginia statutes under consideration.

REASONS FOR GRANTING THE WRIT

I.

IN FAILING TO ALLOW THE DECISIVE ISSUE OF STATE LAW A CHANCE TO BE DECIDED BY THE STATE COURTS OF VIRGINIA, THE COURT OF APPEALS DEPARTED FROM PRIOR DECISIONS OF THIS COURT.

There is no question but that the fundamental issue involved in this case necessitated the interpretation of Virginia state statutes. In particular, it necessitated interpretation of Virginia statutes setting forth the rights of a workmen's compensation insurance carrier to subrogation against a liable third party and the manner of apportioning attorney's fees from the recovery of the insurance carrier and the claimant against such third party. Under the workmen's compensation law of Virginia, an employer or insurance carrier who has paid benefits to an injured employee or his personal representative is entitled to make a claim against a particular party who may be liable to the employee for damages arising out of such injury. Virginia Code

Annotated §65.1-41 (1973). If the employer or carrier collects an amount in excess of the amount it has paid to the employee, it is then required to hold this amount for the benefit of the employee less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees (Id). Similarly, if the employee or personal representative recovers a sum from the third party for the injuries sustained, the employer or insurance carrier is entitled to have deducted from the recovery for its benefit, the amount of compensation paid the employee minus a proportionate share of such amounts as are paid by the employee for reasonable expenses and attorney's fees, Virginia Code Annotated §65.1-42 (1973).

The dispute in the instant case involved the amount of attorney's fees, if any, that Travelers was required to pay as a result of the $75,000.00 recovery against British European Airways Corporation in the District Court. As previously mentioned, at the time judgment was entered on January 15, 1973, Travelers had paid the employee's personal representative $5,040.00. Several months prior to the entry of this judgment, it had been finally and judicially determined that Travelers was no longer obligated to pay the personal representative, Mrs. Sheris, additional compensation benefits. *Sheris v. Sheris Company and Travelers Insurance Company*, 212 Va. 825, 188 S.E.2d 367 (1972), cert. denied, 409 U.S. 878 (1972).

In light of the above, the amount eventually recovered in behalf of the deceased was $69,960.00 and in behalf of Travelers was $5,040.00. Pursuant to a fee arrangement agreement, Mrs. Sheris paid her attorney 1/3 of the total recovery, i.e. $25,000.00 (1/3 x $75,000.00). Since some of the money recovered by

Mrs. Sheris was for the benefit of Travelers, she felt that she was entitled to be reimbursed for a portion of the $25,000.00 in attorney's fees paid by her. Rather than argue she was entitled to merely 1/3 of the $5,040.00 that Travelers paid and was entitled to recover through subrogation, she argued that she was entitled to reimbursement for 1/3 of $18,000.00 or $6,000.00. This was based on the theory that by bringing her suit, Mrs. Sheris saved Travelers from a potential liability of $18,000.00, the maximum amount it may have had to have paid under the initial award of compensation.

The Supreme Court of Virginia to date has not been specifically called upon to decide the correct basis for apportioning attorney's fees when an employee recovers from a third party an amount in excess of the amount paid to him by the insurance carrier plus an amount that could conceivably have been due to him from the insurance carrier in the future. The issue presented in this case is, of course, of interest only to residents of Virginia and those doing business there. The issue is a vital issue and of paramount importance in the State of Virginia. How the issue of attorney's fee apportionment is resolved will determine in the future the means by which employers and the insurance industry proceed in seeing that they are rightfully reimbursed for monies they have spent in satisfying their obligations to an injured employee.

As this is an important state issue bound to affect the future actions of many within the state, the federal court of appeals, lacking the expertise of the Virginia State Courts, should have deferred decision of the issue until such time as the issue was properly presented for decision before the Virginia State Courts. This is a procedure that has been often recognized with approval

by this Court. *Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963); *Clay v. Sun Insurance Office*, 363 U.S. 207 (1960); *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941). Most recently in *Lehman Brothers v. Schein*, No. 73-439, decided April 29, 1974, 42 U.S. Law Week 4603, this court vacated the judgment of the United States Court of Appeals for the Second Circuit and remanded the case so that the Court of Appeals could reconsider whether a controlling issue of Florida law should be certified to the Florida Supreme Court.

This court in *Louisiana P. & L. Co. v. Thibodaux Co.*, 360 U.S. 25 (1959) pointed out the reasons why, when appropriate, the federal courts should abstain from deciding a state question. First, such a policy avoids "the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities . . ." (Id at 28). A second and probably more important reason for a federal court to refrain in a situation such as this is expressed in the *Thibodaux* case as follows:

> ". . . The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours."

(Id at 30). The procedure suggested for bringing the matter to issue in the *Thibodaux* case was by way of securing a declaratory judgment in accord with the Louisiana statutory requirements. (Id at 31). A similar approach could be considered in the instant case.

Though your petitioner never suggested that this matter be determined by the local courts until after the

decision of the federal court, this should not be determinative of this court's decision. As Justice Rehnquist noted in his concurring opinion in *Lehman Brothers*, supra at 4605, the petitioners did not make their request until they petitioned the Court of Appeals for a rehearing. Your petitioner admits that this court's most recent opinion on this issue (*Lehman Brothers v. Schein*, supra) involved a Florida state statute which specifically permitted the Florida Supreme Court to have issues certified directly to it. No such statute exists in Virginia, however, this court in *Lehman Brothers* pointed out that "[w]hen state law does not make the certification procedure available, a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn." (Id at 4604-5) (Footnote and citation omitted); *see also, Clay v. Sun Insurance Office*, supra. As Justice Frankfurter stated in *Railroad Commission v. Pullman Co.*, supra at 500, "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplemented by a controlling decision of a state court."

It is respectfully submitted that in light of the facts of this case and the prevailing case law, this court should consider the appropriateness in this case of first acquiring a judicial determination from the Virginia State Courts on an issue so vital to the State of Virginia.

II.

IN INTERPRETING THE RELEVANT STATE STATUTES THE COURT OF APPEALS DRASTICALLY DEPARTED FROM THIS COURT'S MANDATE IN *ERIE RAILROAD CO. V. TOMPKINS*, 304 U.S. 64 (1938).

As is generally well known, this court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) declared that federal courts, "except in matters governed by the Federal Constitution or by Acts of Congress," are to apply "the law of the State." "And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." (Id). This is a principal that has been referred to and upheld throughout the numerous courts of the United States, as well as this Court, ever since the *Erie* doctrine appeared on the scene in 1938. The cases are too numerous to cite. Suffice it to say that the *Erie* doctrine has been religiously followed by the various federal courts throughout the country. A departure from this accepted and usual federal judicial procedure would, indeed, be drastic.

It is your petitioner's contention that the Fourth Circuit in this instance did make such a drastic departure in that, as will be pointed out subsequently, it failed to let itself be at all guided by the applicable Virginia state law. It is, therefore, appropriate for this court to exercise its power of supervision.

As previously indicated, there was no Virginia Supreme Court decision directly on point with the issue before the Fourth Circuit. As this was a matter involving the interpretation of a Virginia statute, it was incumbent upon the Fourth Circuit to construe it as a

Virginia court would (Id). The mode of interpreting a statute in Virginia was set forth in *Kain v. Ashworth*, 119 Va. 605, 89 S.E. 857 (1916), where the court stated:

> "All rules are therefore subservient to the legislative intent; and, when this is clear from the language used, rules of interpretation give way; the maxim being that it is not allowable to interpret that which has no need of interpretation. Furthermore, this intention is to be gathered from the words used, unless a literal interpretation would lead to a manifest absurdity." Miles Notes on Statutes, p. 24, and authorities cited.

(Id at 858). As will be seen later, an even more appropriate Virginia case is *Miller v. Ayres*, 211 Va. 69, 175 S.E.2d 253 (1970), which stated:

> "No useful purpose will be served by quoting the provisions of state constitutions and statutes which controlled other state courts in arriving at their conclusions, or comparing them with those of Virginia. We are bound by the meaning of the language used in the Virginia Constitution and by the statutes of this State."

(Id at 258). The above cited principals of statutory construction are not only a part of Virginia's body of law, but have also been long recognized by this court. See *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 465 (1968); *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941).

It is your petitioner's contention that a literal and strict interpretation of Virginia Code Annotated §§65.1-42 and 43 (1973) will make it readily apparent what the intention of the legislature was. Virginia Code, §65.1-42 provides in pertinent part:

> "... [t]he court shall, on petition or motion of the employer at any time prior to verdict, ascertain the amount of compensation *paid* ... under the provisions of this Act and deduct *therefrom* a proportionate share of such amounts as are paid by plaintiff for ... attorney's fees as provided in Section 65.1-43 ..." (Emphasis added).

The use of the word "therefrom" admits of no other interpretation than that the proportionate share of counsel fees relates to compensation "paid". Likewise, this is the only interpretation that is consistent with the other provisions of the Act. The employer is entitled under Virginia Code Annotated §65.1-41 (1973) to be reimbursed *only* for the amount "*paid*". (Emphasis added). Virginia Code Section 65.1-43 provides in pertinent part:

> "... [I]f a recovery is effected, either by judgment or voluntary settlement, the ... reasonable attorney's fees of such claimants shall be apportioned pro rata between the employer and the employee, his personal representative or other person, as their respective interests may appear."

It should be noted that the Virginia Code Annotated §65.1-43 is entitled "Expenses and attorney's fees in action under §65.1-41 or 65.1-42." Considering the three relevant statutes together, as we must, it is manifestly obvious that the employer's "respective interest" in the litigation is commensurate with compensation *paid.* Stated another way, the respective interest of the employer in the third party action is precisely that interest for which the Act authorizes the employer to petition or move, i.e. compensation *paid.* Accordingly, it is obvious that the maximum share of attorney's fees for which Travelers can be held

accountable is based on the amount it *paid* or $5,040.00. Its pro rata share in this case would, therefore, be no more than 1/3 of $5,040.00.

The above interpretation is one that strictly construes the statutes of Virginia and one that produces a rational and fair result. As the Virginia court in *Kain v. Ashworth*, supra, stated, Virginia statutes are to be strictly construed unless to do so would bring about an absurd result. It is submitted that the Fourth Circuit's rather loose and lax interpretation of the relevant Virginia State statutes rather than avoid an absurd result, reduces the heretofore absurdly simple to the now present simply absurd. It is important to consider briefly some of the absurd ramifications of the Fourth Circuit decision. Its decision has effectively taken away from insurance carriers the right in many instances to subrogate; a right that was expressly given to the carriers by the Virginia State Legislature when it passed Virginia Code Annotated §65.1-41 (1973) and further, a right recognized by the Supreme Court of Virginia in *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, 373 (1972). As a result of the decision of the Fourth Circuit, rather than being able to recoup its loss of $5,040.00 minus attorney's fees, Travelers is in the unenviable position of in the long run not being able to recover one penny of the $5,040.00 and furthermore, being required to pay to the employee $6,000.00. Such a result is in complete derogation of the express language of the involved statutes.

Consider further the possibility that Mrs. Sheris never made a workmen's compensation claim (the Act obviously does not require that a claim be made), but rather elected to pursue her remedy solely against British European Airways Corporation. Could it be seriously argued that Travelers, the moment Mrs. Sheris

collected her judgment, owed her $6,000.00 in attorney's fees? The decision of the Fourth Circuit would seem to lend itself to such an argument, yet it is obvious that in such a case Travelers would be required to pay attorney's fees for one, whom it did not choose nor in any way controlled, as would necessarily be its rights if made to pay attorney's fees.

Another curious result of the Fourth Circuit's decision is that it allows for the claimant to have more than one recovery, a result which was expressly forbidden by the Virginia Supreme Court in *Sheris v. Sheris Co.*, supra at 373, where it stated that "[the Act] takes from the employee the right *pro tanto* to a double recovery, but beyond this it leaves the employee's right to recover as it was before." It takes no mathematical wizardry to determine that the Sheris estate is entitled to recover under the Fourth Circuit's theory a net amount of $56,000.00 ($75,000.00 plus $6,000 00 minus $25.000.00), which gives the Sheris estate a $6,000.00 windfall at the expense of Travelers, since a full and total recovery against the liable third party would net only $50,000.00 ($75,000.00 minus $25,000.00). This $6,000.00 windfall awarded to the employee is at direct odds with the holding of the Virginia Supreme Court. (Id).

The Fourth Circuit, instead of concerning itself with a detailed analysis of the applicable Virginia statute, relies in supporting its obviously strained construction of the Virginia statutes, on the opinions of other courts, which were analyzing materially different statutes. (22A, footnote 8). As previously indicated, this procedure was in direct conflict with *Miller v. Ayres*, supra, which, again, states:

> "No useful purpose will be served by quoting the provisions of state constitutions and statutes

> which controlled *other* state courts in arriving at their conclusions, or comparing them with those of Virginia. We are *bound* by the meaning of the language used in the Virginia Constitution and by the statutes of this state." (Emphasis added).

It is, incidentially, curious to note that one of the above mentioned cases cited by the Fourth Circuit in footnote 8 of its opinion indicates that the statute under its consideration, prior to its amendment, which left no doubt as to its interpretation, was interpreted in the manner Travelers is now espousing. *Yeager v. Heckman*, 158 F.Supp. 933, 935 (E.D. Pa. 1957).

In light of the above, it appears obvious that the Fourth Circuit paid little heed to the mandate of the *Erie* doctrine and totally disregarded the law of the State of Virginia, whose interests were and always will be paramount to the resolution of the issue before this court. In light of such a high disregard by the Fourth Circuit of a principal so ingrained in the body of federal law, it is submitted that this court should exercise its powers of supervision.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals for the Fourth Circuit reversed.

Respectfully submitted,

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APPENDIX A

[Filed September 23, 1969]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 310-69A

MAIDA LUDVIK SHERIS
and
RICHARD A. MEHLER
Executors of the Estate of
William T. Sheris, Deceased.
Plaintiffs

v.

BRITISH EUROPEAN AIRWAYS CORPORATION, A Corporation
THE TRAVELERS INSURANCE COMPANY, A Corporation
MAIDVA LUDVIK SHERIS, Individually
CHRISTINE ELIZABETH SHERIS, An Infant
CANDACE JO SHERIS, An Infant
and
GLENNA N. SHERIS
Defendants

COMPLAINT

(For Damages—Death on the High Seas Act)

Come now the plaintiffs, Maida Ludvik Sheris and Richard A. Mehler, Executors of the estate of William T. Sheris, deceased, and for their claim herein respectfully represent to the Court as follows:

1. That this Court has jurisdiction under the provisions of the Death on the High Seas Act, 46 U. S. C. § 761, *et seq.*

2. That plaintiffs heretofore qualified as Executors of the estate of William T. Sheris, deceased, before the Clerk of the Circuit Court of Fairfax County, Virginia, on the 20th day of November, 1967, and that the said William T. Sheris died a resident and domiciliary of the State of Virginia.

3. That defendant, British European Airways Corporation, is a carrier for hire, offering international transportation by air under its contracts of carriage and doing business, among other places, in the State of Virginia.

4. That defendant, The Travelers Insurance Company is a Corporation doing business in the State of Virginia and claims an interest, the existence and validity of which plaintiffs deny, relating to the subject of this action and is so situated that the disposition of this action in its absence as a party defendant may as a practical matter leave the defendant, British European Airways Corporation, subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the interest claimed by the defendant, The Travelers Insurance Company.

5. That defendants, Maida Ludvik Sheris, Christine Elizabeth Sheris, Candace Jo Sheris and Glenna N. Sheris, each claims an interest relating to the subject of this action and each is so situated that the disposition of this action in the absence of any one of them may as a practical matter impair or impede her ability to protect that interest.

6. That the said William T. Sheris was a passenger on the defendant, British European Airways Corporation's Flight No. BEzCY284 which crashed with no survivors in international waters between the Islands of Rhodes and Cyprus on October 12, 1967.

7. That the death of said William T. Sheris was caused by the wrongful act, neglect or default of the defendant, British European Airways Corporation, in that under both its contract of carriage and the special contracts herein-

after mentioned, it breached its warranty of safe passage given to the plaintiff for his benefit and in the event of his death for the exclusive benefit of those members of his family on whose behalf this action is filed.

8. That by virtue of certain special contracts of carriage to which the defendant, British European Airways Corporation, is signatory and which were entered into under the provisions of a treaty known as the Warsaw Convention, as amended by the Hague Protocol, the liability of the defendant, British European Airways Corporation, is limited in the circumstances here present to proven damages not to exceed the sum of Seventy-Five Thousand Dollars ($75,000.00).

9. That the defendant, British European Airways Corporation, although denying paragraph 7 hereof, has agreed to settle and compromise all claims of any nature against it including the allegations referred to in paragraph 4 hereof arising out of the death of said William T. Sheris for the sum of Seventy-Five Thousand Dollars ($75,000.00), inclusive of legal fees and costs, that being the limit of liability per passenger under the aforesaid special contracts of carriage to which the British European Airways Corporation is a signatory, subject to the release of all claims of any nature whatsoever against it arising from the death of said William T. Sheris under the laws of the United States, any state, district or territory thereof, or of any foreign state, and subject to the aproval of this Court.

10. That at the time of the death of said William T. Sheris he was 48 years of age, having been born December 14, 1921; was married to the plaintiff, Maida Ludvik Sheris, and lived with her at their residence, 9307 Christopher Street, Fairfax, Fairfax County, Virginia 22030. He was survived by his said wife and two daughters, Christine Elizabeth Sheris, born May 1, 1951, and Candace Jo Sheris, born July 13, 1953. The said widow is not gainfully employed, being occupied with the raising of her two minor

daughters, although, following her husband's death, she was elected as a member of the Board of Directors and as the nominal President of a company in which her husband had owned a majority stock interest. Christine Elizabeth has graduated from Woodson High School and has been admitted to Sweet Briar College. Candace Jo is a member of the junior class at Woodson High School in Fairfax, Virginia, and she also hopes to attend college. The said widow and the two daughters were entirely dependent upon said William T. Sberis as the family provider.

11. That pursuant to the Virginia Workmen's Compensation Act, as amended, the defendant, The Travelers Insurance Company, is obligated to pay to the family of said William T. Sberis the sum of Forty ($45.00) per week for 400 weeks by reason of an award entered under said Act by the Industrial Commission of Virginia in Claim No. 954-575, Case No. 13-205-3624. Payments have been made pursuant to said award in the sum of Forty-Five Dollars ($45.00) per week beginning October 13, 1967.

12. That defendant, The Travelers Insurance Company, had made a claim pursuant to Sections 65.1-41 and 65.1-43 of the Virginia Code of 1950, as amended, for reimbursement from the proceeds of any sums paid to the plaintiffs by the defendant, British European Airways Corporation, to the extent of its payments made under the said award and, further, to be released from any additional payments due thereunder

13. That plaintiffs, however, deny the validity of the aforementioned claim of the defendant, The Travelers Insurance Company, alleging and asserting that the provisions of those sections of the Virginia Code upon which such claim is based are inapplicable and have no force or effect in the circumstances of this case.

14. That plaintiffs consider the offer of settlement made by defendant, British European Airways Corporation, to be fair, reasonable and advantageous and to represent fair

and just compensation for the pecuniary loss sustained by the persons for whose benefit this action is brought.

15. That plaintiffs are entitled to bring this action for damages for the exclusive benefit of the decedent's widow, Maida Ludvik Sheris, the decedent's mother, Glenna N. Sheris, and the decedent's children abovementioned, they being the only members of the decendent's family who sustained damage or pecuniary loss by reason of his death and among whom, in proportion to the loss they have severally suffered, the recovery hereunder should be distributed as follows:

Maida Ludvik Sheris, from which she is to pay legal fees and costs and such sums as may be awarded to said Travelers Insurance Company less its proportionate share of legal fees and costs	$40,000
The duly appointed guardian of Christine Elizabeth Sheris	$15,000
The duly appointed guardian of Candace Jo Sheris	$15,000
Glenna N. Sheris	$5,000

WHEREFORE, the premises considered, plaintiffs pray:

1. That a judgment be entered in favor of the plaintiffs and against the defendant, British European Airways Corporation, in the sum of Seventy-Five Thousand Dollars ($75,000.00); provided, that upon payment thereof the said defendant shall be forever released and discharged of all claims or causes of action, in law or in equity, of any nature whatsoever against it arising out of the death of said William T. Sheris under the laws of the United States, any state, district or territory thereof, or of any foreign state;

2. That this Court declare and adjudge that the defendant, The Travelers Insurance Company, is not entitled in any respect to share in the proceeds of any judgment en-

tered herein in favor of the plaintiffs and against the defendant, British European Airways Corporation, and further that any such judgment shall not operate to relieve the defendant, The Travelers Insurance Company, of or from its obligation to pay to the family of the said William T. Sberis the full amount of the award entered under the Virginia Workmen's Compensation Act by the Industrial Commission of Virginia in Claim No. 954-575, Case No. 13-205-3624;

3. That, in the alternative, if the defendant is adjudged entitled to share, directly or indirectly, in the proceeds of any judgment entered in favor of the plaintiffs and against defendant, British European Airways Corporation, such judgment be made subject to the payment by defendant, The Travelers Insurance Company, of its proportionate share of legal fees and costs incurred by the plaintiffs;

4. That this Court apportion the recovery among those for whose benefit this suit is brought; and in this connection, appoint a guardian *ad litem* to represent the interests of the infant defendants;

5. And for such other and further relief as to the Court may seem meet and proper.

SIMMONDS, COLEBURN, TOWNER & CARMAN

By JAMES H. SIMMONDS
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF VIRGINIA

MAIDA LUDVIK SHERIS 9307 Christopher Street Fairfax, Virginia 22030 RICHARD A. MEHLER 5952 Woodacre Court McLean, Virginia 22101 Executors of the Estate of William T. Sheris, deceased Plaintiffs vs. BRITISH EUROPEAN AIRWAYS CORPORATION, a corporation c/o McGuire, Woods & Battle Ross Building Richmond, Virginia THE TRAVELERS INSURANCE COMPANY, a corporation c/o Harold V. Thornhill 3610 West Broad Street Richmond, Virginia MAIDA LUDVIK SHERIS, Individually CHRISTINE ELIZABETH SHERIS, an infant	:	Civil Action No. 310-69

CANDACE JO SHERIS, an infant	:
9307 Christopher Street	:
Fairfax, Virginia 22030	:
	:
GLENNA N. SHERIS	:
3711 Eighteenth Street, N.	:
Arlington, Virginia	:
	:
Defendants	:
	:

MOTION TO DISMISS

Defendant The Travelers Insurance Company, by counsel appearing specially, herewith moves the Court for an order dismissing the above captioned matter on the grounds that this Court lacks jurisdiction.

The action although captioned one "For damages – Death on the High Seas Act", and although it alleges jurisdiction based upon *Title 46-761, United States Code*, does not allege any controversy, but on the contrary, alleges an actual, accomplished settlement of any claim under the Act cited.

Rather than asserting a controverted claim under the Act, the claim asserted is a transparent effort to:

(1) Obtain judicial approval of a settlement and, at the same time,

(2) Adjudicate a Virginia Workmen's Compensation claim which, under the Virginia Compensation Act, falls

exclusively within the jurisdiction of the Industrial Commission of Virginia.

Neither of the aforegoing invoke the jurisdiction of this Court.

/s/ JAMES C. GREGG
James C. Gregg
P.O. Box 573
Arlington, Virginia
Ex. 3-3390

Attorneys for defendant,
Travelers Insurance Company

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

MAIDA LUDVIK SHERIS, *et al.*, Plaintiffs,

v.

BRITISH EUROPEAN AIRWAYS CORPORATION, *et al.*, Defendants.

CIVIL ACTION No. 310-69-A

PRAECIPE FOR SATISFACTION OF JUDGMENT HEREIN

To: THE CLERK OF SAID COURT:

The judgment entered herein on December 12, 1969, having been satisfied in the following manner:

1. Payments made by British European Airways Corporation as follows:

(a) To Maida Ludvik Sheris, duly appointed guardian of the defendant, Christine Elizabeth Sheris, the sum of $15,000.00.

(b) To Maida Ludvik Sheris, the duly appointed guardian of Candace Jo Sheris, the sum of $15,000.00.

(c) To the defendant, Glenna N. Sheris, the sum of $5,000.00.

(d) To the defendant, Maida Ludvik Sheris, individually, and James H. Simmonds, her attorney, the sum of $34,960.00.

(e) To the Registry of this Court the sum of $5040; and

2. Each party paying his own costs,

counsel for the plaintiffs and for British European Airways Corporation request you to mark forthwith as satisfied and discharged the aforesaid judgment of December 12, 1969.

JAMES H. SIMMONDS
Attorney for Plaintiffs

/s/ ALEXANDER H. SLAUGHTER
Attorney for British European Airways Corporation

Exhibit No. 5

[Filed December 12, 1969]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MAIDA LUDVIK SHERIS, *et al.*, Plaintiffs,

v.

BRITISH EUROPEAN AIRWAYS CORPORATION, *et al.*,
Defendants.

No. 310-69-A

JUDGMENT

Upon consideration of the Complaint, of the Answer of the defendant, British European Airways Corporation, of

the Answer of the defendants, Christine Elizabeth Sheris and Candace Jo Sheris, by their duly-appointed guardian *ad litem*, of the Answer of the defendant, Glenna N. Sheris, and of the Answer of the defendant, Maida Ludvik Sheris, individually; and it appearing to the Court that the Court has jurisdiction;

IT IS ORDERED:

1. That judgment be and it hereby is entered in favor of the plaintiffs and against the defendant, British European Airways Corporation, in the full sum of Seventy-Five Thousand Dollars ($75,000.00); and that upon payment thereof the defendant, British European Airways Corporation, be forever released and discharged of all claims or causes of action in law or in equity of any nature whatsoever against it arising out of the death of William T. Sheris, the plaintiffs' testate, under the laws of the United States, any state, district or territory thereof, or of any foreign state.

2. That the recovery under this Judgment be apportioned and paid out in the following manner:

A. To the duly-appointed guardian of the defendant, Christine Elizabeth Sheris, the sum of Fifteen Thousand Dollars ($15,000.00).

B. To the duly-appointed guardian of the defendant, Candace Jo Sheris, the sum of Fifteen Thousand Dollars ($15,000.00).

C. To the defendant, Glenna N. Sheris, the sum of Five Thousand Dollars ($5,000.00).

Travelers Notified & did not respond O.R.L.

D. To the defendant, Maida Ludvik Sheris, individually, the sum of Thirty-Four Thousand Nine Hundred Sixty Dollars ($34,960.00).

E. And that the balance of Five Thousand Forty Dollars ($5,040.00) be paid into the Registry of the Court, there to await the

final determination of the entitlement thereto, if any, of the defendant, The Travelers Insurance Company, subject, however, and in any event, to the payment by the defendant, The Travelers Insurance Company, of its proportionate share of the expenses and attorneys fees incurred by the plaintiffs in this action.

Dated: December 12, 1969.

OREN R. LEWIS
Judge

FILED
JAN. 15, 1973
CLERK U. S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MAIDA LUDVIK SHERIS, et. al. Plaintiffs v. BRITISH EUROPEAN AIRWAYS CORPORATION and THE TRAVELERS INSURANCE COMPANY, a corporation, et al. Defendants	:	Civil Action No. 310-69-A FINDS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER

FINDINGS OF FACT

This action came on the 15th of December, 1972, to be heard upon the entitlement to the sum of $5,040.00 heretofore deposited with the Registry of this Court.

Upon the record herein and statements for counsel for the plaintiff and counsel for Travelers Insurance Company, the Court makes the following findings of fact:

1. That William Sheris, an employee of the Sheris Company and while in the course of his employment, was killed on October 12, 1967, on the high seas in an

airplane of the British European Airways corporation; and the Industrial Commission of Virginia made an award to his family of $45.00 per week for 400 weeks.

2. That the widow, Maida Ludvik Sheris, the plaintiff herein, employed counsel and contracted to pay him a contingent fee on the basis of one-third of the amount which might be recovered from the British European Airways and that Travelers Insurance Company retained counsel Raymond Kates, Esquire to effect a recovery on its part for its subrogated interest, and to protect its interest in any recovery, likewise on a contingent fee basis.

3. That solely through the efforts of her counsel a settlement of $75,000.00 was agreed upon; and this action was brought by said plaintiff to approve the settlement, to make distribution thereof among the dependent relatives, and to determine the rights, if any, of the Travelers Insurance Company in such recovery.

4. Shortly after the institution of this action Travelers Insurance Company discontinued making the weekly payments of $45.00 (having paid a total of $5,040.00); and it made application to the Industrial Commission of Virginia to vacate and terminate the award to the family on the ground that the dependents of the decedent had, or were about to recover from "another party" a sum in excess of the award made by said Commission.

5. That on December 12, 1969, and prior to a determination by the Industrial Commission of Virginia whether Travelers was entitled to subrogation in the circumstances, this Court entered a judgment approving the settlement, directing a distribution among the dependents and further directing that the sum of $5,040.00 be withheld from the share of the widow and placed "in the Registry of this Court, there to await the final determination of the entitlement

thereto, if any, of the defendant, The Travelers Insurance Company, subject, however, and in any event to the payment by the defendant, The Travelers Insurance Company, of its proportionate share of the expenses and attorneys fees incurred by the plaintiffs in this action."

6. Mrs. Sheris paid the agreed attorney's fee of $25,000 from her part of the award.

7. That this Court postponed hearing on such entitlement until final action by the Industrial Commission of Virginia on Traveler's application for termination of the award.

8. That the Industrial Commission of Virginia and Supreme Court of Virginia determined and decided that Travelers was entitled to subrogation of the claim against British European Airways because the recovery herein exceeded the amount of the award, and thereupon the award was vacated and further payments terminated.

9. The total amount paid by Travelers under the award was the sum of $5,040.00.

CONCLUSIONS OF LAW

1. That Travelers, as subrogee, is entitled to the sum of $5,040.00 deposited with the Court, and any interest earned thereon, less one-third of said amount as a pro-rated share of the attorney's fees to which the plaintiff is entitled.

2. That there is no merit to the contention of the plaintiff that she is entitled to recover from Travelers $6,000.00 as the pro-rated share (1/3) of the attorney's fees paid by her for that part of the recovery from British European Airways Corporation which relieved Travelers of its obligation to pay $18,000 under the

workmen's compensation award by the Industrial Commission of Virginia.

WHEREFORE, it is the judgment of this Court that the amount deposited with the Registry of the Court pursuant to the judgment of December 12, 1969, with any interest thereon be paid two-thirds to Travelers Insurance Company and James M. Gregg, its attorney, and one-third be paid to the plaintiff, Maida Ludvik Sheris, and James H. Simmonds and Richard A. Mehler, her attorneys.

AND THIS JUDGMENT IS FINAL.

Entered: January 15th, 1973.

/s/ Albert V. Bryan, Jr.
JUDGE

SEEN:

/s/ JAMES M. GREGG
James M. Gregg
Counsel for The Travelers Insurance Company

/s/ James H. Simmonds
Of Counsel for Plaintiffs

A True Copy, Teste:
[Illegible], Clerk
By Betty [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1462

MAIDA LUDVIK SHERIS,

Appellant,

-v-

THE TRAVELERS INSURANCE COMPANY,

Appellee.

No. 73-1463

MAIDA LUDVIK SHERIS,

Appellee,

-v-

THE TRAVELERS INSURANCE COMPANY,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

(Argued November 7, 1973.

Decided: February 12, 1974

Before HAYNSWORTH, Chief Judge, and BUTZNER and WIDENER, Circuit Judges.

James H. Simmonds and Richard A. Mehler (Lawrence S. Schaffner on brief) for Maida Ludvik Sheris; James C. Gregg for The Travelers Insurance Company.

BUTZNER, Circuit Judge:

This appeal questions the apportionment of an attorney's fee between a workmen's compensation carrier and the administratrix of an estate who recovered damages for the wrongful death of an employee. The district court used only the compensation installments actually paid as a basis for assessing the carrier's proportionate share of the fee. We conclude that the entire compensation award furnished the appropriate basis for approtionment, subject to a credit allowable to the carrier. Accordingly, we vacate the judgment and remand the case for further proceedings.

William T. Sheris perished in the crash of a transatlantic aircraft. Because his death occurred during the course of his employment, the Industrial Commission of Virginia awarded his widow and minor children compensation payable by his employer's insurance carrier, the Travelers Insurance Company, in 400 weekly installments of $45, totaling $18,000. Mrs. Sheris, suing in district court as administratrix of her husband's estate, also received $75,000 from the airline responsible for his death. From her share of the recovery against the airline, she paid an attorney's fee of $25,000. Thus, while this litigation is cast in terms of apportioning an attorney's fee, it is really an attempt by Mrs. Sheris to obtain from Travelers partial reimbursement for her outlay.

Before the court made final distribution of the $75,000, a dispute over Travelers' right to subrogation was submitted to the Industrial Commission. In that forum, Mrs. Sheris contended that the subrogation provisions of the Workmen's Compensation Act[1] were inapplicable because the airline's liability rested on contractual aspects of the Warsaw Convention and the damages recovered by the estate were in the nature of insurance. The Industrial Commission ruled against Mrs. Sheris, holding that Travelers was subrogated to the estate's rights against the airline. Consequently, it ordered that Travelers should be reimbursed for the weekly installments it had already paid, aggregating $5,040, and it relieved the company of future payments. Thus, Travelers was saved harmless from liability on the entire $18,000 award. The Supreme Court of Virginia affirmed, Sheris v. Sheris Co., 212 Va. 825, 188 S.E.2d 367 (1972). Neither the Commission nor the Court apportioned counsel fees.

Returning to the district court, the parties sought distribution of the award. Travelers asked to be repaid the sum of $5,040 without contribution for counsel fees, because Mrs. Sheris had opposed its right of subrogation. Mrs. Sheris urged that the carrier be assessed a fee of $6,000 based on the entire compensation award of $18,000. The court accepted neither party's position. It ruled Travelers' contribution for fees should be based on $5,040, the amount of compensation it had paid, rather than its potential liability of $18,000. It made no adjustment for Travelers on account of Mrs. Sheris' opposition to

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[1] Va. Code Ann. §§65.1-41 and 42 (1973). The text is quoted in notes 14 and 15, *infra*.

subrogation. Accordingly, from the $75,000 recovery against the airline, the court awarded Travelers $5,040 less 33-1/3% which it deducted for Travelers' share of the fee. Dissatisfied, both parties appealed.

The Virginia Workmen's Compensation Act allows either the employer or the employee to sue the person responsible for the employee's injury except for reasons not pertinent to this case. If the employer sues, he may retain from the damages he recovers a sum sufficient to reimburse himself for the compensation paid, or payable, to the employee, but he must account to the employee for money collected in excess of the award.[2] If the employee sues, the employer is entitled to be reimbursed for compensation already paid and to be discharged from liability for future payments to the extent that the judgment against the wrongdoer is sufficient to satisfy the compensation award. The balance may be retained by the employee[3]. In either instance, the employer's workmen's compensation insurance carrier stands in the shoes of the employer.[4]

For many years an employer who sued the wrongdoer has been authorized to deduct reasonable attorney's fees before remitting to the employee.[5] But before 1960 an employee who brought suit was not entitled to charge any attorney's fees against the

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[2] Va. Code Ann. §65.1-41 (1973). The text is quoted in note 14, *infra*.

[3] Va. Code Ann. §65.1-42 (1973). The text is quoted in note 15, *infra*. Sheris v. Sheris Co., 212 Va. 825, 188 S.E.2d 367 (1972).

[4] Va. Code Ann. §65.1-112 (1973).

[5] *See* VEPCO v. Mitchell, 167 S.E. 424, 425 (Va. 1933) (dictum).

employer's share of the recovery.[6] Frequently these rules placed all of the expense of suing a wrongdoer on the injured employee or his survivors even though the employer or his compensation carrier benefited substantially. To remedy this inequity, the legislature amended the Workmen's Compensation Act apportioning attorneys' fees between the employer and employee as their respective interests may appear regardless of who instituted the suit.[7]

The Supreme Court of Virginia has not been called upon to decide the correct basis for apportioning an attorney's fee when the employee's recovery against the wrongdoer is in excess of both the paid and unpaid portions of a compensation award. Several courts, however, have interpreted apportionment statutes similar, though not identical, to Virginia's. They have ruled that apportionment must be based on the full liability

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[6] *See* Stancil v. United States, 200 F.Supp. 36, 44 (E.D. Va. 1961) (dictum). Travelers' reliance upon *Stancil* is misplaced. In *Stancil* claim was made only for apportionment of attorney's fees on the basis of the compensation already paid, and, therefore, the court had no occasion to discuss the issue presented in the case now before us.

[7] Ch. 89, §39.1 [1960] Va. Acts 108. This section has been recodified as Va. Code Ann. §65.1-43 (1973). It provides:

> "In any such action, or claim for damages, by such employee, his personal representative or other person against any person other than the employer, and in any such action brought, or claim asserted, by the employer under his right of subrogation provided for in §65.1-41, if a recovery is effected, either by judgment or voluntary settlement, the reasonable expenses and reasonable attorney's fees of such claimants shall be apportioned pro rata between the employer and the employee, his personal representative or other person, as their respective interests may appear."

of the employer – the compensation it has paid in the past and the amount that it would be required to pay in the future were it not for the employee's successful suit.[8]

The reasoning of these cases is sound. It rests on the conclusion that there is no rational distinction between the benefit an employer enjoys from being reimbursed for compensation payments already made and the benefit of being released from the obligation to make future compensation payments. Therefore, as one court has pointed out, it is reasonable to assume that the legislature intended the attorney's fee to be prorated to the extent of the benefits the employer received from the recovery against the wrongdoer.[9] Stated negatively, there is nothing to indicate that when the Virginia legislature directed proration of the fees as the interests of the parties may appear, it intended that only part of the interest of the compensation carrier should be taken into account.

While some compensation awards may be modified with respect to future payments, the employee's right

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[8] Dowhy v. Moyer, Inc., 278 F.2d 753 (3rd Cir. 1960); Yeager v. Heckman, 158 F.Supp. 933 (E.D. *Pa.* 1957); Caputo v. Best Foods, Inc., 17 *N.J.* 259, 111 A.2d 261 (1955); Dante v. Gotelli, Inc., 17 *N.J.* 254, 111 A.2d 267 (1955); McMullen v. Maryland Casualty Co., 123 *N.J.* Super. 248, 302 A.2d 181 (1973); Wall v. Conn Welding & Machine Co., 197 *Pa.* Super. 360, 179 A.2d 235 (1962); Soliday v. Hires Turner Glass Co., 187 *Pa.* Super. 44, 142 A.2d 425 (1958); *cf.* Security Ins. Co. of Hartford v. Norris, 439 S.W.2d 68 (Ct. App. Ky. 1969) (apportionment based on equitable, not statutory, grounds); *see* Atleson, *Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees* 19 Buffalo L. Rev. 515, 532 (1970).

[9] *See* Yeager v. Heckman, 158 F.Supp. 933, 935 (E.D. Pa. 1957).

of apportionment should not be defeated.[10] The prospect of modification, however, is a factor that a court should consider in light of the contingency that may affect the award. In the case before us, the possibility of modification of the award presents no problem. Upon Travelers' application, the Industrial Commission released it from future payments because Mrs. Sheris and her children recovered $75,000 from the airline.

Travelers asserts that cases from other jurisdictions are not persuasive because Va. Code Ann. §65.1-42 (1973) expressly provides that the employer's share of attorneys' fees shall be deducted from the compensation actually paid.[11] This provision, Travelers argues, shows conclusively that proration of attorneys' fees must be based on installments of an award already paid, and not on the unpaid installments.

The difficulty with Travelers' position is that it overlooks the significance of the 1960 amendment to the Compensation Act.[12] The principal substantive change was the enactment of a new section recodified as §65.1-43[13] providing that upon the recovery of damages by either the employer or the employee against the wrongdoer, the court should apprortion

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[10] *See* Soliday v. Hires Turner Glass Co., 187 Pa. Super, 44, 142 A.2d 425, 428 (1958).

[11] See note 15, *infra.*

[12] Ch. 89, §§65-38, 39 and 39.1 [1960] Va. Acts 108. The Workmen's Compensation Act was revised and recodified in 1968. Ch. 660, §§65.1-41, 42, and 43 [1968] Va. Acts 1130. The text of these sections was not affected by the 1968 recodification. For convenience, the recodified sections numbers have been used in this opinion.

[13] The text of this section is quoted in note 7, *supra.*

reasonable attorney's fee between the employer and the employee as their interests appear. To carry out this substantive change, the amendment modified two existing sections dealing respectively with suits brought by the employer[14] and suits brought by the employee.[15] These modifications are procedural. They are

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[14] Section 65.1-41 of the Va. Code Ann. (1973) provides:

"The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the employer for the benefit of the injured employee or other person entitled thereto, less *a proportionate share of* such amounts as are paid by the employer for reasonable expenses and attorney's fees *as provided in §65.1-43*...."

[The 1960 Amendment is italicized].

[15] Section 65.1-42 of the Va. Code Ann. (1973) provides:

"In any such action by such employee, his personal representative or other person against any person other than the employer, the court shall, on petition or motion of the employer at any time prior to verdict, ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses, incurred by the employer under the provisions of this Act, *and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable*

designed to insure that the attorney's fees shall be apportioned in accordance with the substantive changes made in §65.1-43 when the proceeds of the judgment against the wrongdoer are disbursed.

Section 65.1-42, on which Travelers relies, simply authorizes a deduction of a proportionate share of the fee from the reimbursement payable to the employer "as provided in §65.1-43." It is obvious, therefore, that §65.1-42 is not, as Travelers contends, a limitation on the general apportionment statute, §65.1-43. Section 65.1-42 does not deal expressly or by implication with the employer's obligation for attorney's fees arising out of the release of future payments that would have been due under the compensation award were it not for the employee's successful suit. This question is governed by §65.1-43, which explicitly states that apportionment must be made as the respective interests of the employer and employee appear.

Travelers' interest in the recovery of $75,000 against the airline is substantially the same with respect to both the paid and unpaid portions of the compensation award. Travelers was relieved from liability from both parts of the award for precisely the same reason – Mrs. Sheris' suit against the airline. Fortuities affecting the time required to bring that litigation to a successful

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expenses and attorney's fees as provided in §65.1-43; and in event of judgment against such person other than the employer the court shall in its order require that the judgment debtor pay such compensation and expenses of the employer, *less said share of expenses and attorney's fees,* so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor.

[The 1960 Amendment is italicized].

conclusion determined in part the amount of compensation that remained unpaid. But these fortuities, similar to those attending all litigation, furnish no rational criteria for determining a just apportionment of the attorney's fee. We conclude, therefore, that Travelers' obligation to pay a part of the attorney's fee must be based on the full compensation award of $18,000.

We turn next to Travelers' cross appeal which charges that because of Mrs. Sheris' opposition to its right of subrogation, the court erred in assessing any fees against it. Travelers' argument, we believe, does not defeat Mrs. Sheris' claim, but it is a factor the court must consider in apportioning the attorney's fee between the parties.

The Compensation Act's direction to apportion fees as the interests of the parties may appear is broad enough to encompass this situation. Travelers has benefited by Mrs. Sheris' suit against the airline, and under the Act it must pay its share of the fee. But the company also had to spend its own money when Mrs. Sheris assumed an adversary position on the issue of subrogation. Therefore, the district court should allow as a deduction from the fee that Travelers would otherwise owe, the amount it reasonably expended to perfect its right of subrogation. In this way the mandate of the statute requiring consideration of the interests of both parties will be fully observed.

The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.